Office-Supreme Court, U.S.
FILED
JUN 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1731

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN TARPEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the agents had probable cause to arrest petitioner.

2. Whether Agent Colgan's warrantless entry into the car petitioner had been driving violated petitioner's Fourth Amendment rights.

3. Whether the warrant to search the car should have been voided because the agent failed to notice a factual error contained in the affidavit submitted to the magistrate in support of the warrant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1980. A petition for rehearing was denied on February 25, 1981 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on April 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to receive and possess, and of possession of, property stolen from an interstate shipment, in violation of 18 U.S.C. 2, 371 and 659. He was sentenced to

concurrent terms of five years' imprisonment on each count and fined $10,000 (Pet. 2). The court of appeals affirmed (Pet. App. 1a-5a).

1. On May 13, 1978, a tractor-trailer carrying $100,000 worth of merchandise—dresses, glassware, cosmetics, and other items—that was being shipped from Q.T. Consolidating Company, North Bergen, New Jersey, to Maas Bros., Inc., Tampa, Florida, was stolen from a parking lot in Secaucus, New Jersey. F.B.I. agents found the abandoned and empty tractor-trailer in Brooklyn, New York, three days later (Pet. 2-3; H. Tr. 253-254; Tr. 161-164).[1] The following day, May 17, a group of agents, including Agents John Kuhn and Richard Mika, began surveilling an open lot in which two trailers containing numerous cartons from the stolen shipment were parked (H. Tr. 13-16; Tr. 106-109, 165-166, 580-584). The agents observed co-defendants John Cerverizzo, Robert Peppaceno and Edward Karnefsky loading cartons from the trailers into a yellow truck and a green van (Pet. 3; H. Tr. 13-16; Tr. 109-115). Two agents followed the yellow truck to a candy store known as Tina's Stationery, which was owned by co-defendant Malben Buchwald, where the cartons were unloaded and taken into the store (Pet. 3-4; Tr. 168-172, 296-299; H. Tr. 251-254, 260-267). After the cartons were identified as having been part of the stolen shipment, Cerverizzo and Peppaceno, who had driven the truck to the store, were arrested (Pet. 4; H. Tr. 256-259).[2]

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[1]"H. Tr." refers to the transcript of the pretrial hearings on the defense motions to suppress. "Tr." refers to the transcript of the continuation of arguments, and the district court's oral rulings, on various pretrial motions, including an application by petitioner for reconsideration of his motion to suppress, and the trial.

[2]Buchwald was arrested five days later (see H. Tr. 297-298). He was convicted, and his appeal was heard together with petitioner's.

Two other agents followed the green truck, which was driven by co-defendant Edward Karnefsky,[3] to a private house, where it was unloaded (Pet. 3; H. Tr. 17-18). Karnefsky then returned to the lot and, a short while later, departed after apparently loading more cartons into the truck. As Karnefsky left the lot, Agents Kuhn and Mika followed him in separate cars. They shortly were overtaken and passed by petitioner, who weaved erratically through the traffic at high speed until he caught up with Karnefsky at a red light (Pet. 4; H. Tr. 24-26, 46-47, 78-80, 83). At that point, petitioner got out of his vehicle, walked over to Karnefsky, spoke to him, and gestured with his arm as if pointing out a direction (Pet. 4; H. Tr. 21, 26, 81). Petitioner then reentered his vehicle and drove off at a moderate rate of speed with Karnefsky following him (H. Tr. 26-28, 81-83).

Shortly after 4:00 p.m. (H. Tr. 88), after traveling some 40 blocks, petitioner parked at the curb and got out of his car. Karnefsky double parked next to him (H. Tr. 28, 82-83). The agents pulled in front of and behind the two vehicles. Agent Mika approached petitioner, asked him to step into the FBI vehicle, and asked to see his driver's license and vehicle registration. Petitioner produced an expired New York State driver's license and a registration disclosing that the vehicle he was driving was registered to Buchwald (H. Tr. 28-29, 84). In response to Mika's question, petitioner stated that he knew Karnefsky and that Karnefsky was following him to his vending business office. Mika advised petitioner of his rights and that he was being detained in order to determine whether the green van contained stolen property (H. Tr. 29-31).

Meanwhile, Agent Kuhn had approached Karnefsky and asked him what was in the back of the truck. Karnefsky

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[3]Karnefsky is a fugitive and has not been brought to trial (Tr. 66).

voluntarily opened the rear door, and Kuhn observed five boxes and five crates with markings indicating that they were consigned to Maas Bros., Tampa, Florida (H. Tr. 84-85). In response to Kuhn's question, Karnefsky stated that he did not know petitioner and had merely asked him for directions (H. Tr. 86).

The two agents then compared notes (H. Tr. 31-32, 87-88). Thereafter, they detained petitioner and Karnefsky on suspicion of involvement in the transportation of stolen merchandise (H. Tr. 114) while Kuhn made a series of telephone calls to the supervisor in the New York FBI office who dealt with hijacking (H. Tr. 88). From these telephone calls the agents learned of the activities and the arrests at Buchwald's candy store and the fact that the property recovered there had been identified as stolen property consigned to Maas Bros. (H. Tr. 89-90, 132-135). They also learned that petitioner had previously been convicted of conspiracy to possess property stolen from an interstate shipment (H. Tr. 91). At 5:30 or 5:45, Agent Colgan, who had arrested petitioner in the previous case, arrived to assist (H. Tr. 90, 140, 161). After conferring with Mika and Kuhn, Colgan contacted his supervisor to request authorization from the United States Attorney's office to arrest petitioner and Karnefsky (H. Tr. 141-142).[4] When authorization finally was obtained (H. Tr. 143), petitioner and Karnefsky were formally arrested at 6:50 p.m. (H. Tr. 162).

2. After petitioner was arrested, he expressed concern to Agent Mika about the security of his automobile, since the keys to the vending machines were in the trunk of the vehicle. He asked Mika if it would be permissible for him to park the vehicle in a nearby parking lot that belonged to a

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[4]The practice in the Eastern District of New York at that time was for FBI agents to obtain authorization from the United States Attorney's office before making an arrest (H. Tr. 142).

friend of his named Ralphie. Mika replied that it would not be permissible because petitioner was under arrest, but that the agents would move the vehicle to the parking lot if petitioner desired. Petitioner agreed and gave Mika the keys to his car (H. Tr. 34-35). Mika informed Colgan of the problem, and Colgan accompanied petitioner to Ralphie's office, where petitioner told Ralphie that the agents would turn over the car and the keys to him in the near future. Ralphie agreed to secure petitioner's car for the night (H. Tr. 35, 144-145). Colgan then brought petitioner back outside and Mika handcuffed him. At approximately 7:15 p.m. Mika drove petitioner and Karnefsky away in an FBI vehicle, while Kuhn took charge of Karnefsky's truck (H. Tr. 35-36, 93, 145-146).

As the other agents left, Colgan, to whom Mika had given the keys to petitioner's automobile (H. Tr. 35, 145-146), entered the vehicle for the purpose of driving it the 30 feet to the parking lot (H. Tr. 147, 160).[5] As Colgan started to pull out, another car came by and Colgan applied the brakes. When he did so, papers slipped out from under the front passenger seat, and he noticed that one was a consignment slip to Maas Bros., Tampa, Florida, with an invoice number (H. Tr. 147). Accordingly, instead of proceeding into the parking lot, Colgan went to a nearby telephone booth and called his supervisor, who directed him to secure the vehicle until it could be towed away (H. Tr. 148-149).[6]

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[5]Under cross-examination, Colgan testified that he had implied, but not express, authorization from petitioner to enter the car to move it (H. Tr. 151). Colgan, however, had not been present when Mika received express authorization from petitioner for the agents to move the car to the parking lot (see H. Tr. 35).

[6]Petitioner offered an entirely different version of the circumstances surrounding Agent Colgan's entering the car. Petitioner claimed never to have consented in any manner to the agents' entering or moving the vehicle (H. Tr. 190). According to petitioner, upon his arrest Colgan asked him if he had somebody to take care of the car and he replied that he would speak to Ralphie. At that point an acquaintance named

The next day, pursuant to a warrant, FBI agents searched petitioner's impounded automobile and seized 255 shipping documents showing Maas Bros. as consignee and two small black notebooks (H. Tr. 99). Agent Kuhn had signed the affidavit in support of the warrant application, but it had been drafted by an Assistant United States Attorney on the basis of information she had received from Kuhn and from other agents through Kuhn (H. Tr. 94, 97-98, 136). Colgan

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Lennie Insalaco came along, and petitioner told Colgan that Insalaco, who worked out of the same office that he did, could take care of the vehicle. When he started to hand the keys to Insalaco, however, Colgan grabbed them and told Insalaco to go into the office, telling petitioner that Insalaco should stay out of the matter so as not to get locked up (H. Tr. 192-193).

Insalaco testified that he came upon the scene around 4:00 or 4:30 and saw petitioner sitting in his car, but did not speak to him (H. Tr. 169, 176-177, 179). Instead, he went into Ralphie's place of business and stayed 25 to 30 minutes (H. Tr. 179-180, 183). He then left and walked to the corner to get a soda, again passing petitioner without speaking to him. Twenty to 30 minutes later, he returned (H. Tr. 183-184). As he walked up, he heard petitioner, Ralphie, and an agent discussing whether Ralphie would secure the car (H. Tr. 184-185). Upon seeing Insalaco, petitioner said that he wanted him to take the car and bring it to the office; petitioner specifically added that "by no means" did he want the agent to have the vehicle (H. Tr. 171-173, 185). On direct examination, Insalaco said that petitioner's words were that he wanted Insalaco to have "the keys," and that he reached to take them but the agent grabbed them instead and then told him that he could have the keys and the car and said that he should sign a release and would be given the keys and could take the car away (H. Tr. 185). On both direct and cross-examination, Insalaco said that he was told to wait inside the building, and that 45 minutes later he saw the car being driven away backwards up the street (H. Tr. 172-173, 185-187). On direct examination, he also stated that it was dark and he could not see who was driving the car (H. Tr. 173).

Both Colgan and Mika denied that the key grabbing incident had occurred (H. Tr. 69, 164). Colgan testified that the only "semblance of accuracy to that story" was that, prior to petitioner's arrest, Colgan, someone whom Colgan did not know, and petitioner had engaged in a street conversation during which no transfer of anything occurred (H. Tr. 164).

had advised Kuhn that he had observed the papers found in petitioner's vehicle under the front seat, and Kuhn had passed that information on to the Assistant United States Attorney. The affidavit, however, stated that as Colgan entered the car he observed the papers in plain view on the seat of the vehicle. Kuhn read the affidavit before signing it, but he did not read the inaccurate paragraph closely and therefore did not catch the mistake (H. Tr. 98-99, 123). Indeed, Kuhn did not become aware of the inaccuracy until the prosecutor pointed it out to him subsequent to the agents' execution of the warrant (H. Tr. 136-137).

ARGUMENT

1. Petitioner first contends (Pet. 13-17) that the search of his car was tainted because there was no probable cause for his prior arrest. On the basis, however, of Karnefsky's prior removal of stolen goods from the lot and delivery of them to the private house (of which Agent Mika, at least, was aware (H. Tr. 22)), the agents had an articulable and reasonably based suspicion that Karnefsky was in the process of making a second delivery of stolen goods. Petitioner's actions in overtaking and then leading Karnefsky gave the agents objective reason to suspect that he too was involved in that delivery. Thus, as the district court found (Tr. 14), the agents were justified in stopping both men to make inquiry. See *Terry* v. *Ohio*, 392 U.S. 1 (1968).

From that point forward, the quantum of "cause" that the agents possessed multiplied. First, upon Agent Mika's request, petitioner produced an expired driver's license and a registration for the car he was driving in the name of co-defendant Buchwald. Once the agents found goods they believed to be stolen in Karnefsky's van and discovered that he and petitioner had given conflicting versions of their relationship to each other, they had probable cause to arrest petitioner. As the court of appeals put it (Pet. App. 3a), "[f]rom this sequence of events and the presence of the

stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that [petitioner] was directing the delivery of the cartons or was otherwise connected with their distribution. Thus, probable cause existed for his arrest." The agents had additional cause to arrest when they subsequently learned of the arrests at the candy store, the identification of the goods delivered to that store as some of those that had been stolen from the shipment to Maas Bros., the apparent involvement of Buchwald (the registered owner of the automobile that petitioner was driving), and petitioner's prior interstate theft conviction. It is of no moment that, out of an abundance of caution, the agents did not formally make the arrests until long after they had a basis for doing so, since the detention during this period was supported by probable cause; moreover, no evidence against petitioner resulted from the delay in formally arresting him.[7]

Petitioner's reliance (Pet. 13-17) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is wholly misplaced. The decision in *Dunaway* turned on the fact that the detention in that case was not supported by probable cause. Here, by contrast, there was probable cause to arrest petitioner almost from the outset of his detention.

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[7]Petitioner attaches great weight to what he describes (Pet. 6, 17) as Agent Kuhn's testimony that the time between petitioner's initial detention and formal arrest was spent trying to figure out with what, if anything, he would be charged. In fact, petitioner's counsel phrased cross-examination questions to Kuhn in those terms and received as responses, "[b]asically, yes" (Tr. 508; H. Tr. 131). A similar question to Agent Mika, however, drew a negative response (H. Tr. 42). It is clear from the testimony of both agents, however, as well as that of Agent Colgan, that the time was spent first in ascertaining what information had been developed by agents involved in other phases of the investigation, and then in waiting for authorization to make the arrests from the United States Attorney's office.

2. Petitioner next contends (Pet. 17-21) that the search of the car was tainted because Agent Colgan's entry into the vehicle for the purpose of securing it was unauthorized and illegal. This contention also is without merit.

In the first place, the evidence petitioner offered to establish Colgan's lack of authority to enter the vehicle was internally contradictory. For example, Insalaco testified that he first arrived on the scene around 4:00 or 4:30, spent 25 to 30 minutes in Ralphie's place of business and another 20 to 30 minutes getting a soda, and at that point came upon petitioner, Ralphie, and an agent (who was shown to be Colgan) discussing the securing of petitioner's vehicle (H. Tr. 169, 176-177, 179, 183-185). Thus, by Insalaco's own account, it was 5:30 at the latest when petitioner attempted to hand him the keys to the car. But Colgan did not arrive on the scene until 5:30 to 5:45 (H. Tr. 140, 161), and petitioner's arrest—the event that necessitated arrangements to secure the vehicle—did not occur until 6:50 (H. Tr. 162). Similarly, Insalaco testified that he waited 45 minutes before seeing the car driven off and that he could not see who was driving because it was dark (H. Tr. 172-173, 185-187). By his chronology, this event would have taken place no later than 6:30. However, in New York, on May 17, with daylight savings time in effect, it is still quite light at 6:30 (see H. Tr. 209). Finally, Insalaco testified that the agent agreed to his taking custody of the vehicle and directed him to go inside the building to wait for a release to sign (H. Tr. 185). Petitioner, testifying about the same event, contradicted Insalaco by stating that the agent (whom he identified as Colgan) directed Insalaco inside the building and told petitioner that Insalaco should stay out of the matter so as not to get locked up (H. Tr. 193).

Even more significantly, while the district court did not expressly discredit the testimony of petitioner and Insalaco, it found (Tr. 15) that the "arrangement made" was that

Ralphie was "to assist" petitioner by permitting Colgan to "deposit the car" in Ralphie's parking lot. In short, the court's finding was that Colgan entered the car solely for the purpose of securing it on petitioner's behalf. Nothing in the evidence suggests that Colgan used or intended the security arrangement as a pretext for searching the car, and petitioner makes no such claim.[8] Thus, even if Colgan did undertake to handle the car's security against petitioner's wishes, there would be no Fourth Amendment violation. The Fourth Amendment does not protect against all invasions of property rights, but only against "unreasonable searches and seizures." Here there was no search; the shipping documents came into plain view when Agent Colgan applied the brakes. We doubt that Colgan's entry into the car to move it properly can be considered a seizure, since the agent asserted no dominion over the vehicle adverse to petitioner's interest. But even if it can be, since the "seizure" was for the benign purpose of securing the car for petitioner's benefit, we submit that it cannot be characterized as "unreasonable." Cf. *United States* v. *Markland*, 635 F. 2d 174, 176 (2d Cir. 1980), cert. denied, No. 80-6454 (May 18, 1981). This Court has explained that the exclusionary rule is a remedial device, the application of which "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Where, as here, there is no intent to search or otherwise invade privacy, the remedial objectives of the exclusionary rule simply are not served by applying the rule to what is at most a law enforcement officer's insistence on securing an arrestee's vehicle in disregard of the arrestee's own wishes.

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[8]Agents Mika and Colgan testified on cross-examination that they had no reason to believe that contraband or evidence would be found in petitioner's vehicle (H. Tr. 70, 162).

Finally, Agent Colgan was entitled, if not obligated, to enter the vehicle for the purpose of securing it in the performance of what this Court has described as law enforcement officers'" 'community caretaking functions.' " *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973).[9] Petitioner attempts (Pet. 19-20) to distinguish *Opperman* and *Dombrowski* on the ground that in those cases the defendants were not available to arrange for the safekeeping of their cars. To be sure, that factor is not present here. As the district court noted (Tr. 14-15), however, there is an additional circumstance in the present case—the fact that the car was registered in someone else's name—that called for the performance of the agents' " 'community caretaking function.' "

3. Finally, petitioner claims (Pet. 22-25) that the search warrant that the agents subsequently obtained was invalid because the affidavit submitted in support of it inaccurately stated that as Agent Colgan entered the vehicle he observed the incriminating shipping documents in plain view on the car seat. In *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court held (*id.* at 155-156) that a search warrant would be voided if the defendant proved, by a preponderance of the evidence, "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause * * *." Contrary to petitioner's assertions, however, the inaccuracy in the affidavit was neither an intentional nor a material falsehood.

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[9]Relying on *Opperman*, *supra*, the district court opined (Tr. 14-15) that Agent Colgan would have been justified in entering the car even for the purpose of impounding it.

Agent Kuhn did not, as petitioner represents (Pet. 22), acknowledge that he "was aware of [the statement's] falsity prior to swearing to the truth thereof before the United States Magistrate." Rather, the agent testified that he knew that the documents had come into view when they slipped out from under the driver's seat, but that he did not appreciate, from his hasty reading of the affidavit (see H. Tr. 99), that it related the facts any differently (H. Tr. 123). In *Franks* v. *Delaware, supra*, 438 U.S. at 170, this Court expressly held that a search warrant would not be voided simply because "police have been merely negligent in checking or recording the facts relevant to a probable-cause determination."[10]

Moreover, the discrepancy was immaterial to the finding of probable cause for issuance of the search warrant. Rather, the crucial fact in obtaining a warrant to search the car was that the shipping documents were observed in it; whether Agent Colgan saw them on the seat as he entered the car, or whether they came into view only when he subsequently applied the brakes, is entirely irrelevant.[11]

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[10]In contrast to his argument before this Court (Pet. 25), at the suppression hearing petitioner's counsel expressly eschewed "saying [the affidavit] is intentionally false" (H. Tr. 212).

[11]Petitioner argues (Pet. 23, 25) that the magistrate might not have issued the warrant without further inquiry had he been informed of the actual manner in which the documents were found. But no evidence adduced at the suppression hearing called into question the truth of Agent Colgan's testimony that the shipping documents slid into view when he applied the brakes. Hence, there is no reason to believe that the magistrate would not have issued the warrant on the basis of the "true" version of how the documents came to Agent Colgan's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

DOJ-1981-06